



Signed and Filed: May 27, 2025

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
ARCON CONSTRUCTION CORPORATION,) No. 24-30679
Debtor.) Chapter 11
) HEARING HELD:
) Date: May 16, 2025
) Time: 10:00 AM
) Via Video/Teleconference
)

ORDER SUSTAINING OBJECTION TO DESIGNATION UNDER SUBCHAPTER V

The court held a hearing on Creditor 653 28th Street, LLC's ("Creditor") (1) *Objection to Designation Under Sub-Chapter V Pursuant to 11 U.S.C. § 1181(1)*; and (2) *Motion to Extend Time to Object Pursuant to Federal Rule of Bankruptcy Procedure 1020(B)* ("Objection") (Dkt. 127) on the above-captioned date and time. Appearances were noted on the record. At the conclusion of the hearing, the court took the matter under submission.

Upon due consideration and for the reasons set forth below, the court HEREBY SUSTAINS the Objection.¹ Debtor is ineligible

¹ It also finds extension of time to object unnecessary for the reasons stated in the text.

1 to proceed as a debtor under Subchapter V of the Bankruptcy
2 Code.²

3 **I. Relevant Background**

4 Debtor filed bankruptcy on September 13, 2024 (Dkt. 1) and
5 elected to proceed under Subchapter V. Debtor filed its
6 required schedules on September 27, 2024, listing noncontingent,
7 liquidated liabilities totaling \$2,151,316.73, which at the time
8 was far below the debt threshold of noncontingent, liquidated
9 debt in the amount of \$3,024,725 for Subchapter V debtors. See
10 §§ 1182(a), 101(51D). These scheduled liabilities included
11 damages owed to Creditor arising out of a state court case, but
12 did not include attorneys' fees owed to Creditor. On October
13 21, 2024, Creditor timely filed Proof of Claim 9-1, for damages
14 and attorneys' fees owed to it based on a judgment in favor of
15 Creditor in San Francisco Superior Court case CGC-19-574888.
16 The proof of claim reflects damages and accruing interest in the
17 amount of \$736,207.60 and attorneys' fees in the amount of
18 \$825,000.³

19
20 ² Unless specified otherwise, all chapter and section references
21 are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* and all
22 Rule references are to the Federal Rules of Bankruptcy
23 Procedure.

24 ³ As reflected both on this court's docket and the state court
25 docket, Debtor failed to inform any party involved in the state
26 court proceeding that it had filed bankruptcy until October
27 2024. Consequently, a judgment on the statement of decision was
28 entered on September 26, 2024. The court granted relief from
the automatic stay on November 21, 2024 to allow parties to take
any steps needed to finalize the state court judgment. An order
granting relief from stay was not entered until December 9, 2024
(Dkt. 74) as counsel for Debtor refused to sign off on the form
of order as originally directed by the court. The judgment,

1 The meeting of creditors was held and concluded on October
2 21, 2024. The deadline to object to Debtor's Subchapter V
3 designation was November 20, 2024. Rule 1020(b). Over four
4 months later, Debtor amended its schedules, adding twelve
5 previously unscheduled creditors with noncontingent, liquidated
6 liabilities totaling \$557,061.04. These February 4, 2025
7 amendments also reclassified a previously allowed claim of
8 MINFIN-SC-S1 LLC in the amount of \$151,003, so that it was no
9 longer a debt but a "loan" that Debtor alleged did not count
10 toward the Subchapter V debt limit, and later clarified that the
11 loan had been paid off pre-bankruptcy.

12 Debtor also apparently failed to schedule three other debts
13 in either the original schedules or the later amendments. The
14 unscheduled proofs of claims reflect noncontingent, liquidated
15 debts totaling \$440,878.83.

16 In all, had the September 2024 schedules included the debts
17 later listed in the February 2025 amendments and the attorneys'
18 fees owed to Creditor, let alone the debts reflected in the
19 unscheduled proofs of claim, it would have been obvious to the
20 court and any interested party that Debtor was ineligible to
21 proceed under Subchapter V.

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24 including the exact amount damages and a statement that Creditor
25 is entitled to recover attorneys' fees "in an amount to be
26 determined by post-trial motion" is final. Debtor has not
27 disputed the finality of that order, nor does Debtor dispute
28 that the damages owed pursuant to that judgment are a
noncontingent liquidated liability. Debtor only disputes
whether the attorneys' fees owed pursuant to the judgment count
toward the Subchapter V debt limit.

1 **II. Analysis and Discussion**

2 Generally, any objection to a debtor's designation as a
3 small business debtor electing to file Subchapter V must be
4 filed within 30 days of the completion of the meeting of
5 creditors. Rule 1020(b). Failure to file an objection to the
6 designation in this timeframe may result in a waiver of a
7 party's ability to object. See *In re Village Oaks Senior Care,*
8 *LLC*, 664 B.R. 170, 175 (Bankr. E.D. Cal 2024) (citing *Resource*
9 *Funding, Inc. v. Pacific Continental Bank (In re Washington*
10 *Coast I, LLC)*, 485 B.R. 393, 407 n.12 (9th Cir. BAP 2012)).
11 Waiver is an equitable doctrine and should not be applied where
12 an inequitable result would occur. *In re Village Oaks*, 664 B.R.
13 at 177. Ultimately, the Debtor bears the burden of proving that
14 it is eligible to remain in Subchapter V. *Id.* at 179 (citing
15 *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638
16 B.R. 403, 413 (9th Cir. BAP 2022)).

17 Debtor argues that the Objection is untimely and thus any
18 objection to the Subchapter V designation has been waived, and
19 that the attorneys' fees owed to Creditor do not count toward
20 the Subchapter V debt limit because the attorneys' fees owed to
21 Creditor represented a contingent, unliquidated, and "illusory"
22 debt.

23 First, the court addresses the timeliness of the Objection.
24 Creditors must be able to rely on the schedules presented as
25 well as the information provided in the meeting of creditors.
26 Otherwise, a debtor would be incentivized to file misleading
27 schedules to manufacture Subchapter V eligibility, only to amend
28 those schedules without challenge to that eligibility later. *In*

1 re *Village Oaks*, 664 B.R. at 178 ("Applying the waiver doctrine
2 under these circumstances would encourage-if not reward-the
3 knowing and intentional use of false schedules in which debt is
4 manipulated to achieve Subchapter V eligibility or at least make
5 it more likely.").

6 While Creditor seeks to have its Objection heard despite
7 the passing of the deadline under 1020(b) under an excusable
8 neglect theory pursuant to Rule 9006, application of an
9 excusable neglect theory in this instance is not necessary. In
10 this case, the neglect, excusable or otherwise, is on the part
11 of the Debtor. Whether by design, inadvertence, or
12 carelessness, Debtor's initial schedule of creditors and
13 liabilities was incomplete to the tune of over \$557,000. Debtor
14 has belatedly explained that it initially believed that it
15 needn't schedule debts or creditors that were not expected to
16 pursue repayment and amended its schedules when Debtor realized
17 that all debts must be accounted for (Dkt. 167). While this
18 explanation is unconvincing, it is also irrelevant. The burden
19 is not on the Debtor to explain its beliefs at the time of
20 filing, its burden is to show that it was eligible to proceed
21 under Subchapter V on the date of filing its bankruptcy
22 petition.

23 Debtor argues that the attorneys' fees are a contingent,
24 unliquidated, and "illusory" debt. The court notes that
25 Debtor's contention that the attorneys' fees are unliquidated
26 was raised for the first time in its belated post-hearing
27 declaration but will address the argument for the purpose of a
28 complete record.

1 The term "illusory" is of no legal consequence. The Code
2 does not account for "illusory" debts anywhere, let alone in
3 Subchapter V. "It is also settled that a debt is noncontingent
4 if all events giving rise to liability occurred prior to the
5 filing of the bankruptcy petition." *Nicholes v. Johnny*
6 *Appleseed (In re Nicholes)*, 184 B.R. 82, 88 (9th Cir. BAP 1995)
7 (citing *In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987)).
8 There is no question that the right to recover attorney's fees
9 was awarded in the state court's now final judgment. All
10 actions giving rise to that liability had taken place—the debt
11 was noncontingent at the time of filing, even if the precise
12 amount of the debt was meant to be finalized in a post-trial
13 motion and even though the Debtor had the right to dispute them.
14 Even the call for a post-trial motion does not mean the debt was
15 unliquidated. A debt is liquidated if "it is subject to ready
16 determination and precision in computation of the amount due."
17 *In re Fostvedt*, 823 F.2d at 306. The fees were already computed
18 and rendered down to a number in Creditor's Proof of Claim, and
19 any court is readily able to determine with precision a request
20 for attorneys' fees. The attorneys' fees were thus a liquidated
21 debt at the time of the bankruptcy petition. Debtor knew of the
22 attorney's fees claim at the time of filing, and could have
23 scheduled the fees as disputed, which would have at least put
24 creditors, in addition to Creditor, on notice that such a large
25 claim existed and may affect Debtor's Subchapter V eligibility.

26 After the February 4, 2025 amendments, the numbers compel
27 the conclusion that Subchapter V was not an option for the
28 Debtor, and the Debtor knew this to be the case. Especially

1 telling is Debtor's complete non-response to Creditor's
2 assertion that its original schedules and February 4 amendments
3 were tailored to remain under the Subchapter V threshold.
4 Debtor's Opposition does not explain why its original schedules
5 were accurate, or why its February 4, 2025 amendments were so
6 substantial.

7 Debtor's conduct plainly waived its right to complain that
8 Creditor's later challenge to eligibility came after the Rule
9 1020 deadline.

10 **III. Conclusion**

11 For the reasons set forth above, Creditor's Objection is
12 SUSTAINED. Debtor is ineligible to proceed as a debtor under
13 Subchapter V of the Bankruptcy Code. Debtor shall, on or before
14 **June 6, 2025**, file a Declaration stating its intent to proceed
15 as a debtor under Chapter 11 or as a debtor under Chapter 7 and
16 upload an order reflecting its decision. By that deadline it
17 may also file and set for hearing under normal procedures a
18 motion to dismiss this case.

19 If Debtor's declaration indicates an intent to proceed as a
20 Debtor under Chapter 11, the court will set a status conference
21 on June 27, 2025 at 10:00 A.M.

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23 *** END OF ORDER ***
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